No. 12511.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, *et al.*,

Appellants,

vs.

MALLONEE, *et al.* SHAREHOLDERS PROTECTIVE COMMITTEE OF LONG BEACH ASSOCIATION, LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, TITLE SERVICE COMPANY, *et al.*,

Appellees.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, FAHEY *et al.*,

Appellants,

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, *et al.*

Appellees.

BRIEF OF APPELLEES, HOME OWNERS.

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PURPOSE OF BRIEF.

Appellee, Home Investment Co., of Long Beach, and other interveners (hereinafter sometimes referred to as "Home Owners"), are vitally interested in the pending appeal, inasmuch as it is an attempt to divest the District Court of jurisdiction and dismiss all proceedings heretofore had and done for lack of jurisdiction, thereby invalidating all prior orders of the court, many of which have become final, which would, to say the least, result in great confusion and entanglement of titles of Home Owners, particularly the titles to the numerous properties

which have heretofore been quieted and cleared through the more than fifty intervention proceedings.

The jurisdiction of the court in the *Mallonee* case and the *Los Angeles Bank* case, two independent actions, which have been consolidated in the District Court, has been attacked and if the contention of appellants is upheld, the entire litigation, including the numerous intervention actions and proceedings on behalf of the Home Owners, would be nullified, resulting in title entanglements, confusion, irreparable damage and absolute loss of faith in the lending institution and the courts.

It is for this reason that the Home Owners present this brief, even though they were not movants in the preliminary injunction proceedings.

JURISDICTIONAL STATEMENT.

Home Owner appellees, for the purpose of brevity, join in and adopt those portions of the brief of appellee, Long Beach Association, as to:

1. Description of litigation;
2. Jurisdictional statement;
3. Statement of the case;
4. Scope of review of appeal from preliminary injunction;
5. Immunity from suit;
6. Indispensable parties;
7. Conclusiveness of findings;
8. Propriety of preliminary injunction.

Additional treatment as to the jurisdiction of the court in this case, will be found in the Statement of the Case and the Argument, hereinafter set forth.

STATEMENT OF THE CASE.

Appellee Home Investment Co. of Long Beach first appeared in the court proceedings on July 1, 1946 [R. 257] as an intervener to secure an order of the District Court, quieting title and to secure reconveyances of 174 deeds of trust, involving approximately $800.000.00 which had theretofore been interplead by answer and cross-claim in interpleader [R. 43] and deposited in the Registry of the District Court, by appellee Title Service Company (Defendant in the *Mallonee* action), as the trustee named in said 174 deeds of trust. Appellee Title Service Company had been named as trustee in deeds of trust, affecting 8,000 borrowers of which appellee Long Beach Federal Savings and Loan Association was named as beneficiary, and the aggregate balances upon said deeds of trust was approximately $12,000,000.00 [R. 44].

Appellee Home Investment Co. of Long Beach filed with the District Court its petition [R. 270] and motion for leave to intervene [R. 259], which motion was granted by the court.

The complaint of appellee Home Investment Co. of Long Beach [R. 260] sets forth in substance the following facts:

The intervener is the borrower named in the 174 deeds of trust on deposit in the Registry of the Court and the record owner of the real property affected by said deeds of trust; that appellee Title Service Company was the trustee thereunder; that appellee Long Beach Federal Savings and Loan Association was the beneficiary.

That intervener had carried on negotiations with the appellee Association to pay the loans in full but before

the refinancing could be completed, appellant conservator Ammann had taken possession of the Long Beach Association and thereafter intervener was unable to obtain the necessary reconveyances; that intervener would suffer great and irreparable loss; that intervener would be adversely affected by the distribution or other disposition of the property in the custody of the court, and that the court had jurisdiction by reason of diversity of citizenship, and the interpretation and effect of laws and regulations, to-wit:

1. Home Owners Loan Act of 1933;
2. Federal Home Loan Bank Act, as amended;
3. The National Housing Act—Public No. 479;
4. Regulations, rules and directives purportedly made and adopted pursuant to and under each and all of said acts;
5. Judicial Code, Title 28, Sec. 41(26).

The prayer for relief asked for an order against all parties in interest to show cause why payments should not be accepted through the court and reconveyances issued. The complaint also asked for damages, reasonable attorneys' fees and court costs.

Based on said petition to intervene, the court entered an order to show cause directed to all plaintiffs and defendants and specified the manner of service [R. 280].

Separate answers were filed by appellees Mallonee, *et al.*, Long Beach Federal Savings and Loan Association and Title Service Company, to the complaint in intervention of Home Investment Co. of Long Beach [R. 411-424]. Appellants never answered or denied any of the complaints in intervention.

Following a hearing on the order to show cause. the court on July 12, 1946, entered an order, directing the execution of 174 trust deed reconveyances, specifying the manner of payment, and defining the rights of the parties [R. 523].

The order, among other things, directed Title Service Company to deposit 174 reconveyances in duplicate with the clerk of the court and ordered the clerk to deliver the original copies to appellee Home Investment Co., of Long Beach, upon payment of $774,927.90, plus accruing interest.

The order further provided:

> "That upon payment of the aforesaid amounts to the Clerk of this Court, the said Clerk shall forthwith deposit said sums of money in the registry of this Court, and said amounts shall remain on deposit in the registry until the further order of this Court, and the rights heretofore existing of each and every party to this action, except as to the Intervener Home Investment Co. of Long Beach, a corporation, its successors or assigns, be and the same are hereby expressly reserved and preserved without prejudice and shall be enforced against said sums of deposited money to all intents and purposes as though said reconveyances had not been executed and delivered pursuant to this Order." [R. 527.]

Said order [R. 528] further provided:

> "That this Court reserves jurisdiction of this matter so as to enable it to make such other and further orders in the premises to carry out the terms, conditions and provisions of this Order, and for the allowance of attorneys fees and costs, if any, and otherwise."

No appeal was ever filed to this Order and it has become final.

Subsequent to the filing of the complaint in intervention of appellee Home Investment Co., of Long Beach, there were filed during the years 1946, 1947 and 1948, approximately fifty independent intervention actions, affecting 400 parcels of real property, and approximately $1,500,000.00 was deposited in the registry of the court pursuant to said orders. [R. 8288-8293.] Except for the fact that in most instances the trust deeds and notes had not theretofore been interplead in court prior to the filing of the motion to intervene, all said intervention actions followed the same general pattern of procedure during the entire period of the conservatorship. It was only by following such plan that the Home Owners were able to secure merchantable titles, insurable by title companies in Southern California.

The intervener Home Owners and their grantees have relied upon the numerous judgments in interpleader (intervention) of the District Court and to now uphold the contention of appellants that the entire proceedings in the District Court be dismissed for lack of jurisdiction, would result in chaos and irreparable damage, which is one of the many reasons why the preliminary injunction now under attack was granted by the District Court and should be affirmed [R. 8271].

It is inconceivable how the appellants at this late date would dare attempt to undermine the public confidence, not only insofar as it pertains to financial institutions over which they exercise some supervision, but also in the federal judicial system.

The District Court has pending before it many matters affecting titles to Home Owners, among them being the following:

(a) The assignment of the Home Owners notes to the San Francisco Bank.

(b) The dispute as to the existence of the San Francisco Bank.

(c) The loan of $6,300,000.00 of the seized Los Angeles Bank assets.

(d) The restraining order against appellant Ammann transferring the appellee Association's assets to the San Francisco Bank.

(e) The final determination of the right of the parties of the money and properties deposited in the Registry of the Court pursuant to the various orders in intervention and interpleader, all of which have become final.

Appellee Home Owners contend that it is imperative that such matters be determined by the court having jurisdiction, that is, the District Court in Southern California.

The conclusiveness of the judgments in intervention obtained in 1946, 1947 and 1948 cannot now be attacked or denied by appellants. During the year 1947, appeals were taken by appellants [R. 3152-3153] from four judgments [R. 2393-2398, 2519-2524, 2561-2565, 3136-3141], which said appeals were later dismissed [R. 3976-3978].

QUESTIONS INVOLVED.

Appellants set forth the presented questions at pages 21 and 22 of their brief. Appellee Home Owners present the following additional questions:

1. Are the judgments in intervention affecting and quieting titles of numerous Home Owners (interveners herein) final so they cannot be affected by this appeal?

2. Was the preliminary injunction necessary to protect the titles of the Home Owners quieted by previous orders of the District Court, from further confusion and entanglements?

3. To whom are the Home Owners to look for relief in the future should the contention of the appellants be upheld and the consolidated actions in the District Court be dismissed?

THE ANSWER TO QUESTION (1) OF THE HOME OWNERS MUST BE IN THE AFFIRMATIVE.

All litigation must end at some stage of the proceedings. In the case of *Stoll v. Gottlieb,* 205 U. S. 165, 83 L. Ed. 104, it was held that a court must have power to determine whether or not it has jurisdiction of the person of a litigant or whether his geographical jurisdiction covers the place of the occurrence under consideration, and it further held that it is just as important there should be a place to end as there should be a place to begin litigation.

In the case of *Treinies v. Sunshine Mining Co.,* 308 U. S. 66, 84 L. Ed. 85, the Supreme Court in affirming the Court of Appeals for the Ninth Circuit held that one trial of an issue is enough and that the principles of *res*

judicata applied to questions of jurisdiction as well as to other issues.

Reference is also made to the following authorities:

American Surety Company v. Baldwin, 287 U. S. 156, 77 L. Ed. 231;

Baldwin v. Iowa Travelling Men, etc., 283 U. S. 522, 75 L. Ed. 1244.

THE ANSWER TO QUESTION (2) OF THE HOME OWNERS SHOULD ALSO BE IN THE AFFIRMATIVE.

The Order 2015 calling for administrative hearing [R. 8242-8247] is an attempt to appoint a receiver for appellee Long Beach Federal Savings and Loan Association, who would succeed to all its rights in and to all moneys and property interplead into the Registry of the District Court, and the removal and taking possession thereof would in fact nullify the claims of the parties thereto as specifically reserved in the numerous intervention orders [R. 527].

The courts in the past have jealously guarded their rights to prevent interference with orders quieting title to property.

Order 2015 to show cause why receivers should not be appointed for appellee Long Beach Federal Savings and Loan Association is an attempt to circumvent the orders and judgments of the District Court.

Appellee Home Owners in support of their contention cite in detail the case of *Dugas v. American Surety Co.,* 300 U. S. 414, 81 L. Ed. 720.

The above case was an interpleader action wherein Surety Company deposited total amount of bond in the U. S. Court, which entered judgment thereon determining liability of the surety company to plaintiff. The judgment enjoined any other state or federal court actions against the interpleading company. Defendant brought another action in the state court against another and different surety company on a different bond which nevertheless related to the same transaction, and upon which the interpleading surety company would eventually be liable for payment. The interpleading surety company filed a supplemental bill in its original interpleader action, setting forth the indirect method attempted by defendant, to evade the prior interpleader decree, and referring to the earlier judgment and injunction in interpleader of the court.

The court under its interpleader jurisdiction, promptly enjoined any further prosecution of the new state court action. Plaintiff took this appeal to the Supreme Court challenging the jurisdiction of the District Court and particularly its power to enjoin proceedings against non-parties to the original interpleader action.

The District Court found that the new state court action against a different defendant was "in contravention of the spirit if not the letter of the decree in the interpleader suit."

The United States Supreme Court affirmed the injunction and said (quoting the interpleader statute):

> "Sec. 2. . . . Notwithstanding any provision of the Judicial Code to the contrary, said court shall have power to issue its process for all such claimants

and to issue an order of injunction against each of them, enjoining them from instituting or prosecuting any suit or proceeding in any State court or in any other Federal Court . . . on such bond . . . until the further order of the court; which process and order of injunction shall be returnable at such time as the said court or a judge thereof shall determine and shall be addressed to and served by the United States marshals for the respective districts wherein said claimants reside or may be found."

"Sec. 3. Said court shall hear and determine the cause and shall discharge the complainant from further liability; and shall make the injunction permanent and enter all such other orders and decrees as may be suitable and proper, and issue all such customary writs as may be necessary or convenient to carry out and enforce the same. . . ."

"Plainly the court had jurisdiction of both the subject matter and the parties. No appeal was taken from either decree. Therefore Dugas was bound by both decrees. . . . But these rulings were all made in the exercise of the court's jurisdiction, were subject to challenge and re-examination only on appeal, and became conclusive on him in the absence of an appeal." (Emphasis added.)

"Sec. 5. The jurisdiction to entertain the supplemental bill is free from doubt. Such a bill may be brought in a Federal Court in aid of and to effectuate its prior decree to the end either that the decree may be carried fully into execution or that it may be given fuller effect, but subject to the qualification that the relief be not of a different kind or on a different principle. Such a bill is ancillary and dependent, and

therefore the jurisdiction follows that of the original suit, regardless of the citizenship of the parties to the bill or the amount in controversy.

"6. The power of the court to enjoin Dugas from further prosecuting his suit in the state court on the appeal bond has full support in §§ 2 and 3, of the Interpleader Act of 1926 before quoted, as also in settled adjudications respecting the power of a federal court to protect its jurisdiction and decrees."

The Court at pages 726 and 727 said:

"In the interpleader suit there was an actual, complete and judicially sanctioned payment. . . . While the payment was into the court's registry, and not directly to the claimants, it nevertheless was a lawful and effective payment under the Interpleader Act. In effect the first decree converted the claims under the bond into claims against the fund paid into the registry; . . ."

In the case of *City of Orangeburg v. Southern Railroad Co.*, 134 F. 2d 890 (C. C. A. 4), the court held:

". . . the court . . . may enjoin the parties from proceeding in any other court when the effect of the action therein would be to defeat or to impair its own jurisdiction. . . ."

The court also held in the case of *Julian v. Central Trust Company,* 193 U. S. 629, 48 L. Ed. 629, that where the federal court acts in aid of its own jurisdiction and to render its decree effectual, it may restrain all proceedings which would have the effect of defeating or impairing its jurisdiction.

THE ANSWER TO QUESTION (3) OF THE HOME OWNERS MUST ALSO BE ANSWERED IN THE AFFIRMATIVE.

At the outset of the intervention proceedings, title insurance companies in Southern California were reluctant to insure titles obtained by the Home Owners under the procedure outlined in the statement of the case (*supra*), and it was only after many long conferences, the reliance on the fact that the money representing the deeds of trust and the rights of the parties thereto was preserved in the numerous court orders, and the persuasion of the court [R. 10165] that the Home Owners were able to obtain title policies.

The District Court upon an intervention hearing, made the following comments regarding the title situation [R. 10165]:

> "Mr. NeCasek: Let us both go up and talk to the Title Insurance Company.
>
> The Court: I am serious about giving consideration to the matter of making the title company a party to the action. You have 8000 parcels of property, you say, that are involved. We already have, I do not know how many interventions already in here, 200 or 300 parcels of property involved in this, and if custom is not a showing, I do not know what else is. You just cannot sell a piece of property here, it is not merchantable, to anybody except on the successor basis who will buy things without looking.
>
> Mr. NeCasek: There are hundreds of escrows being held up, titles in jeopardy here all over the country, all over Southern California, on account of this situation. I get calls every day from people wanting to know if they can get some relief. I have

given the matter considerable thought and consulted with the title company and they feel that they want a good foundation laid to have a good reason why they can back up their position by going ahead and issuing them without exception."

This Honorable Ninth Circuit Court is well aware of the title situation in California, that is, titles are not ordinarily merchantable unless the buyer or lender is furnished a policy of title insurance.

Appellee Home Owners again strenuously urge the upholding of the District Court's jurisdiction and refer again to the chaotic condition which would again prevail in the event of the holding that the District Court lacked jurisdiction to make and enter the numerous orders in interpleader and intervention, quieting title to approximately 400 parcels of real property.

THE QUESTION RAISED IN APPELLANTS' BRIEF AS TO INDISPENSABLE PARTIES HAS NO MERIT.

Appellants' contention that by reason of the fact that they are a governmental agency or members thereof, and therefore their actions are beyond the review of any court, or that they are immune from suit, is beyond comprehension. It is conceded that the Federal Home Loan Bank of San Francisco and the Federal Savings and Loan Insurance Corporation are both "sue or be sued" corporations. It is also conceded that under regulation C. F. R. 24, Section 149.5 which defines the powers and duties of a conservator that such conservator may sue or be sued.

In the cases of *Land v. Dollar,* 330 U. S. 731, 91 L. Ed. 1209; *Keifer v. Reconstruction Finance,* 306 U. S. 381, 83 L. Ed. 785; *Federal Housing Administration v. Burr,* 309

U. S. 242, 84 L. Ed. 724, and *Reconstruction Finance Corp. v. Menihan,* 312 U. S. 81, 85 L. Ed. 595, it is specifically held that the doctrine of immunity of Federal agencies is not favored by Congress or the courts.

The contention of the Home Owners is that if any immunity ever did exist, it was waived and abandoned by the general appearance of appellant Home Loan Bank Board and its members when they filed in the District Court a certified copy of Resolution 388 [R. 3404], which by its terms removed the conservator, appellant Ammann, under court order.

The attitude of Congress towards agencies' immunity from suit is expressed in Section 10(c) of the Administrative Procedure Act, Title 5 U. S. C. A., Sec. 1009, which provides that every agency action made reviewable by statute, and every final agency action from which there is no other adequate remedy in any court, shall be subject to judicial review. It would therefore appear that if there is no other adequate remedy for judicial review, the Administrative Procedure Act creates one.

In the case of *Reconstruction Finance Corporation v. Menihan* (*supra*), the court held:

> ". . . that waivers by Congress of governmental immunity from suit should be liberally construed in the case of federal instrumentalities—that being in line with the current disfavor of the doctrine of governmental immunity—we conclude that in the absence of a contrary showing 'it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with the authority to 'sue or be sued' that agency is not less amenable to judicial process than a private enterprise under like circumstances one would be' . . ."

Appellee Ammann, as conservator, was the agent of the indispensable parties and he actively participated in all the intervention proceedings by filing schedules revealing to the court the amount necessary to repay the numerous loans [R. 405] and by full compliance with the court's orders in depositing documents and funds in the Registry of the Court as directed by said orders.

ON THE QUESTION OF OUT OF STATE SERVICE AND PROPRIETY OF THE INJUNCTION TO RESTRAIN THE HOLDING OF THE ADMINISTRATIVE HEARING, THE INTERPLEADER JURISDICTION OF THE DISTRICT COURT IS A COMPLETE ANSWER.

The right of Home Owners to intervene and interplead in order to avoid double liability and multiplicity of actions is affirmed in the decision of *Treinies v. Sunshine Mining Company,* 308 U. S. 66, 84 L. Ed. 85 (*supra*). This case holds that one trial of an issue is sufficient and that the principles of *res judicata* apply to questions of jurisdiction as well as to other issues. Prior to the District Court assuming jurisdiction of the above case, actions had been instituted in the state courts of Washington and Idaho, which resulted in conflicting judgments over the ownership of stock in the Sunshine Mining Company. Subsequently, the mining company filed an interpleader action in the District Court in Idaho and secured an injunction against further proceedings in the state courts. In deciding the case, the U. S. Supreme Court said:

> "By the Act of January 20, 1936, (Old Title 28 U. S. C. A., Sec. 41, Subd. 26) the district courts have jurisdiction of suits in equity, interpleading two or more adverse claimants, instituted by complainants

who have property of the requisite value claimed by citizens of different states. The suit may be maintained 'although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another'."

Appellants questioned the power of a Federal Court in Idaho to enjoin proceedings by a receiver in the State of Washington, before the Washington state courts. In upholding such power in the Idaho Federal Court, the Supreme Court said:

> "Process may run at least throughout all the states.
>
> "Neither are the provisions of Sec. 265 of the Judicial Code, 28 U. S. C. A. 379 applicable. That section forbids a United States court from staying proceedings in any state court. The Interpleader Act, passed subsequently, however, authorizes the enjoining of parties to the interpleader from further prosecuting any suit in any state or United States court on account of the property involved. Such authority is essential to the protection of the interpleader jurisdiction and is a valid exercise of the judicial power." (Emphasis added.)

The parties to the appeal attempted to re-litigate the jurisdiction of the state courts which had made final judgments determining such question of jurisdiction. In refusing to permit re-litigation of jurisdiction when the judgments of the state court had become final, the Supreme Court said:

> "One trial of an issue is enough. The principles of *res judicata* apply to questions of jurisdiction as

well as to other issues, as well to jurisdiction of the subject matter as of the parties. (Citing authorities.)" (Emphasis added.)

Railway Express Co. v. Jones, 106 F. 2d 341 (C. C. A. 7—1939);

Rosetti v. Hill, 162 F. 2d 892 (C. C. A. 9—1947);

Security Bank v. Walsh, 91 F. 2d 481 (C. C. A. 9—1937);

Dugas v. American Surety Co., 300 U. S. 414, 81 L. Ed. 720 (1937).

In the case of *Cramer v. Phoenix, etc.,* 91 F. 2d 141 (C. C. A. 8, 1937), the court in affirming interpleader jurisdiction held that it is elementary that when one court takes jurisdiction of a specific thing, the *res* is as much withdrawn from the judicial power of another court as if removed to a different territorial sovereignty. The court further held that the tribunal whose jurisdiction first attaches, holds it to the exclusion of all others.

In the case of *Maryland Casualty Co. v. Glassell-Taylor, etc.,* 156 F. 2d 519 (C. C. A. 5, 1946), the court held that the Federal Rules of Civil Procedure were not designed merely to prevent a multiplicity of suits and protect the stakeholder from multiple liability, that they were also intended to require all interested parties to come in and set up their claims in one case. It further held that the interpleader statute was also designed to afford a means of process by which claimants to a fund who live in other jursidictions, may be called in and required to litigate in one court to the end that all claimants to the fund, as

well as the holder of the fund, may be given ample protection.

United States v. Sentinel Fire Insurance Co., 178 F. 2d 217 (U. S. Court of Appeals, 5th Circuit—1949);

Rule 22 F. R. C. P., Secs. 1335, 1397 and 2361 (former 41 (26)) of Title 28 U. S. Code.

In rem jurisdiction has been established pursuant to Section 1655 (formerly Sec. 118), Title 28 U. S. Code. The District Court has jurisdiction pursuant to orders heretofore made and not appealed from, shown in Exhibits "A", "D", "E", "F" and "H", commencing at R. 8310 and ending at R. 8398.

Looney v. East Texas R. R. Co., 247 U. S. 214, 62 L. Ed. 1084 (1918);

Julian v. Central Trust Co., 193 U. S. 629, 48 L. Ed. 629 (1904).

CONCLUSION.

The attack of appellants, collaterally or otherwise, of the jurisdiction of the District Court is without merit and the appeal should be dismissed and the order appealed from affirmed.

Respectfully submitted,

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